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SABAH MARKETING CORP. SDN. BHD.

v.

HOCK HUAT CHAN OIL MILL SDN. BHD.

HIGH COURT BORNEO, KOTA KINABALU

ABU MANSOR ALI J

b

[CIVIL SUIT NO. K 902 OF 1986]

23 JANUARY 1987

CIVIL PROCEDURE: *Application to strike out amended defence - Whether affidavit evidence admissible for the purpose of an application under O. 18 r. 19(1)(a) of the Rules of the High Court 1980.*

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The plaintiffs' claim was for a sum of RM301,250 being dead freight incurred by the plaintiffs and alleged loss sustained by the plaintiffs by reason of the defendant's failure to take delivery of goods sold by the plaintiffs to the defendants. The defendants denied the alleged contract. Alternatively the defendants pleaded that the plaintiffs were stopped from saying that there was a contract reached as at all material times the parties were at a negotiation stage subject to entry of agreement. The defendants further denied that the plaintiffs suffered loss and that they owe the sum of RM301,250.

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On 29 October 1986, the plaintiffs applied under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 to strike out para. 2 of the amended defence denying that there was a concluded contract and to strike out the amended defence under O. 18 r. 19(1)(c) and (d) and under the inherent jurisdiction of the Court on the ground that the amended defence is an abuse of the process of the Court and is meant to delay the fair trial of the matter. In support of the application the plaintiffs filed an affidavit and argued that affidavit evidence is admissible as the evidence referred to in O. 18 r. 19(2) applies only to oral evidence but not to affidavit evidence as interpreted in s. 2 of the Evidence Act 1950.

*e***Held:***f*

[1] It is well established law that in an application under O. 18 r. 19(1)(a), the applicant is disallowed the use of affidavit evidence. Before a statement of claim or defence can be struck out it must be apparent from the statement of claim or defence itself. The affidavit may only be looked at for the purpose of considering an application under the other arms of O. 18 r. 19(1)(c) and (d) and under the inherent jurisdiction of the Court.

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[2] Without the benefit of any affidavit it is plain that there are several clear issues that this Court should allow to go to trial irrespective of whether the defendants will succeed at the trial.

[3] Whether an agreement was in fact concluded, the defendants would be entitled to trial where it would be in the province of the trial Court only to decide after proper evidence and proper evidence and proper submission on the law.

[Plaintiffs' application dismissed with costs.]

*h***Cases referred to:**

New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor. [1985] 1 MLJ 226

Davey v. Bentinck [1893] 1 QB 188

Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 29

Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] CLJ (Rep) 231

Wenlock Moloney & Ors. [1965] 2 All ER 871

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Cheong Ngam Sen v. Yeoh Bah Chee [1981] 1 MLJ 161

Legislation referred to:

Evidence Act 1950, s. 2

Rules of the High Court 1980, O. 18 r. 19, 19(1)(a), (d), (c), O. 1 r. 4, O. 18 r. 19(2)

For the plaintiffs applicants - Yapp Hau Pehn; M/s. Wong Yapp Chung & Co.

For the defendants respondents - Abdul Rahim Noor (Abdul Razak Rouse with him); M/s. Rayner & Co.

JUDGMENT

Abu Mansor Ali J:

By their writ - Encl. (1) - dated 8 July 1986 the plaintiffs sued the defendants for RM241,250 being alleged loss sustained by the plaintiffs by reason of defendants' failure to take delivery of 1000 metric tons of palm oil and 500 tons of palm kernel alleged to be duly sold by plaintiffs to defendants. On 4 September 1986 the defendants filed the statement of defence - Encl. (4) - denying alleged contract, plaintiffs' loss and that they owe the sum of RM301,250. On 29 October 1986 the plaintiffs filed an application under O. 18, r. 19, praying for an order that the defendants' amended defence be struck out on the ground that the defence discloses no reasonable defence, abuse of the process of Court and meant to delay the fair trial of the matter and praying for judgment be entered for the whole of plaintiffs' claim, or part thereof and costs.

I ordered that arguments be heard in open Court and after hearing both parties on 23 January 1987 I dismissed plaintiffs' application with costs.

In support of the application the applicants filed an affidavit -Encl. (7A) - and this was replied to by the defendants by filing affidavit - Encl. (8).

At the commencement of open Court argument Mr. Yapp Hau Pehn Would appear to have anticipated the defendants'/respondents' objection to the use of affidavits in his application under O. 18, r. 19(1)(a), Rules of the High Court. He argued that affidavit evidence is admissible for the purpose. If I understand him correctly the evidence referred to in O. 18, r. 19(2) is as provided for in the Evidence Act 1950. Section 2 of that Act says the Act applies only to oral evidence but not to affidavit evidence. Hence such affidavit is admissible, he submitted. He further submitted that the case of *New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 MLJ 226 would, therefore, appear to have been wrongly decided as no reference was ever made to s. 2 of the Evidence Ordinance and O. 1, r. 4 of the High Court Rules contains no definition of the word "evidence". With due respect to Counsel I think it is well established law that in an application under O. 18, r. 19(1)(a), Rules of High Court, the applicant is disallowed the use of affidavit evidence. O. 18, r. 19(2), Rules of High Court, is quite specific for it says: "(2) No evidence shall be admissible on an application under para. (1)(a)".

While saying that the Evidence Act 1950 dos not apply to affidavits filed in Court to say that affidavit may be used in an application under O. 18, r. 19(1)(a) is another thing altogether. In *Davey v. Bentinck* [1893] 1 QB 188 it had been decided that long ago that no such affidavit evidence is admissible. Before a statement of claim or defence can be struck out it must be apparent from the statement of claim or defence itself. In respect of the use of a affidavit in such an application the case of the *New Straits Times v. Kumpulan Kertas Niaga* case above only reaffirms that principle by the Federal Court and this Court is by the doctrine of *stare decisis* bound. The Court therefore rejected applicants' affidavit in considering whether the defence discloses any reasonable defence under O. 18, r. 19(1)(a) and for the purpose of considering the first ground looked for what is apparent from the statement of defence itself.

a The affidavit was, however, referred to in considering the remaining two other grounds of abusing the process of the Court under O. 18, r. 19(1)(d) of the Rules of High Court and considering the allegation meant to delay the proper trial for this action under O. 18, r. 19(1)(c) thereof in that order.

b As regards the amended defence the plaintiffs/applicants applied to strike out Para. 2 thereof denying that there was a concluded contract between the parties in terms alleged in para. 3 of the statement of claim. In para. 3 the defendants pleaded alternatively the plaintiffs were estopped from saying there was a contract reached as at all material times the parties were at negotiation stage subject to entry of agreement. The defendants in para. 4 deny the plaintiffs suffered loss or damage and in para. 5 they further aver they deny that they were responsible for any loss, if any, sustained by the plaintiffs. Lastly, the defendants deny that they owe the plaintiffs the sum of RM301,250 or any part thereof to the plaintiffs.

c Since the affidavit is inadmissible in an application under this O. 18, r. 19(1)(a) of the High Court Rules 1980 without the benefit of any affidavit filed by the plaintiffs from the amended defence it is plain to the Court that there are several clear issues that this Court should allow to go to trial irrespective of whether the defendants will succeed at the trial.

d The authorities on the point of striking out under O. 18, r. 19 of the High Court Rules 1980 are many. In *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 29 it was said in order to succeed in an application to strike out the defence the plaintiffs must show strong grounds. Then there was a decision which says the Court should use its powers in this regard sparingly exercising it in plain and obvious cases. Suffice to say the Court refused to strike out the defendants' amended defence in this instance as the matter was far from plain. On this ground I dismissed the applicants' application.

e I turn next to whether the Court would act to strike out the amended defence under the other arms of O. 18, r. 19(1)(c) and (d) and under the inherent jurisdiction of the Court. As has been said for this purpose the affidavit filed by the plaintiffs/applicants may be looked at.

f The plaintiffs urged the Court these headings because they say there had been a concluded contract. This is evidenced, they say, in TCS-1 and TCS-2 both dated 3 January 1986 attached to Encl. (7A), the supporting affidavits. They are telex from defendants to plaintiffs whereby the defendants are alleged to have confirmed the purchase of palm oil and palm kernel referred to in para. 3 of the statement of claim. In telex TCS-3 dated 19 February 1986 the defendants are alleged to have requested for further time to take delivery of the said palm oil and kernel.

g In telex TCS-4 dated 19 February 1986 the plaintiffs advised the defendants of their liability if delivery is not taken. As a consequence of defendants failing to take delivery of the goods the plaintiffs incurred dead freight in the sum of RM60,000 and the best price available to the plaintiffs at the date of the writ for palm oil was RM545 per metric ton and palm kernel RM235 per metric ton. It is not disputed in each of the telexes there were words "Our contract No... to follow." Counsel for the applicants submitted that looking at the exhibits together he says there is a concluded contract and the defendants have breached the contract. The defence, the plaintiffs say, is mere denial. According to applicants' Counsel there are only two main points. They are:

- h* (a) Whether in all circumstances there was a contract; and
- i* (b) Whether the contract was subject to formal contract and if formal documents were in issue then it is a matter of interpretation. Then in respect of this latter point Counsel cited *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] CLJ (Rep) 231 to the effect that if the Court comes to a finding that no formal contract is required then formal document may be ignored.

It is well that I pause here to remind myself that the last point brought out by Counsel for the applicants himself is most pertinent and he should have appraised himself of the ground he trudged. The function of the Court in hearing this application under O. 18, r. 19 should not be confused with the function of the would-be trial Judge in this matter. Counsel's latter submission on the question of interpretation of the contract would be right if the Court is the Court of trial. I have to remind myself I was dealing with an application in Chambers, although adjourned to Open Court. In *Wenlock Moloney & Ors.* [1965] 2 All ER 871 it was said that it was not open for the Judge in chambers to embark on a trial of an application in Chambers. On the matter of this question of law of interpretation whether an agreement was in fact concluded the defendants would be entitled to trial where it would be in the province of the trial Court only to decide after proper evidence and proper submission on the law. Similarly in *Cheung Ngam Sen v. Yeoh Bah Chee* [1981] 1 MLJ 161, a case not cited before me, a summary judgment was set aside on appeal since the tenant was entitled to a trial on a question of law where the tenancy agreement states, "subject to further consideration for renewal of lease".

As a matter of fact the defendants have denied that a contract was ever concluded and their defending this action was not to delay the fair trial of this action. Counsel for the defendants submitted there was a doubt as to whether there was a contract and such doubt can only be ascertained after a trial. In particular he submitted that that formal agreement was to follow TCS-1 and TCS-2 has not been disputed. A further doubt is to be found in para. 3(1) and 3(2) of the statement of claim in the writ - Encl. (4) - where the contract no. 860102 and contract PK 860101 respectively are mentioned. There was no mention of this anywhere in the plaintiffs' affidavit and the defendants are therefore kept in the dark as to these particulars and terms had not been disclosed anywhere in such affidavit. It is clear to the Court TCS-1, TCS-2 and TCS-3 are all telexes using short abbreviated forms or words and in order to understand and appreciate the Court had to have expert witness to read them. Evidence had to be led at proper trials that the parties have used these words in the course of their dealings and understand them to mean what they say.

Then in Encl. (8), para. 8, the defendants say they also wish to defend as regards the disputed sum of RM301,250 alleged to be owing saying that this sum is an arbitrary figure and they will strenuously challenge that sum at the trial. It is clear to the Court that the proper place where this can be resolved is at proper trial and this Court would not shut out the defendants at that stage or even attempt or try to connect the telexes to this sum of accept without proper proof the exact value of the palm oil or palm kernel price at the time when the plaintiffs sold them. These are issues for the trial Judge and the trial Judge alone after hearing evidence.

After having appraised myself properly of the amended defence, the submission of the parties and the law, I cannot find I could bring myself to strikeout the defence either on the ground of abuse of the process of the Court, trying to delay the fair trial of the action or under the inherent jurisdiction of the Court since the defendants have, by their amended defence, raised triable issues which only a trial could resolve.

For reasons given I dismissed the plaintiffs' application with costs. The plaintiffs appeal.

Also found at [1987] 2 CLJ 276

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